Supreme Court, U.S.
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No. 97-_____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

Jonathan A. Chandross

Petitioner,

vs.

Maria Arena, Joshua Levin, and
Levin, Clancy, Foster & Arena

Respondents.

On Petition For A Writ of Certiorari
To the United States Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Can the New Jersey Supreme Court conduct a radical "experiment" in the denial of due process by expanding the state's restrictive — and unique throughout the United States — party joinder rules to require the joinder of litigation against an attorney to the underlying action in which the attorney represented the client — even when the client's claims against the attorney have *nothing* to do with the underlying litigation and where the damages, if any, have not yet fully accrued — make the experiment retroactive to cases where the underlying matter *concluded* three years earlier, and then *repudiate* this experiment two years after it was started — but after dismissing a Petition for Certification while the Court was still writing the decision repudiating the experiment — and make the reversal retroactive *only* to active cases instead of to all cases dismissed during the experiment's two year window?

(2) Can the New Jersey Courts limit an attorney's liability to the fee paid by the client — when no such cap has ever been enacted by the legislature — by forcing the victimized client to undergo fee arbitration by the Bar Associations Fee Arbitration Committee — where arbitration is *not* provided for by law or contract — and thereby deny access to the Courts to the class of people who want to sue their attorneys?

(3) Does New Jersey's restrictive Entire Controversy Doctrine violate the constitutional right to Due Process?

LIST OF PARTIES

The caption contains the names of all the parties to this proceeding.

This case was decided by the Superior Court of New Jersey, affirmed by the New Jersey Appellate Court, and certification was denied by the New Jersey Supreme Court.

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PETITION FOR A WRIT OF CERTIORARI

I, Jonathan A. Chandross, petition the Court to issue a writ of certiorari to review the decision and judgment of the Superior Court of New Jersey, entered on September 29, 1995, affirmed by the Appellate Court on January 16, 1997, Petition for Certification denied by the New Jersey Supreme Court June 17, 1997.

OPINIONS BELOW

The decision of the Superior Court of New Jersey, Union County, was entered on September 29, 1995, is unpublished and reproduced as (APPENDIX B, APPENDIX C). The decision of the Appellate Court was entered on January 16, 1997, is unpublished, and is reproduced as (APPENDIX D). The denial of the Petition for Certification by the New Jersey Supreme Court was entered on June 17, 1997, is unpublished, and is reproduced as (APPENDIX E).

STATEMENT OF JURISDICTION

Petitioner seeks review of the judgment of the Superior Court of New Jersey, entered on September 29, 1995. The Supreme Court of the United States of America has jurisdiction pursuant to 28 U.S.C. 1257:

> **(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the ... validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution ... or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution ...**

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourteenth Amendment of the United States Constitution provides, in part, that:

> **... no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**

The Fifth Amendment of the United States Constitution provides, in part, that no person shall "be deprived of life, liberty, or property, without due process of law...".

STATEMENT OF THE CASE

Certiorari is sought because the New Jersey Supreme Court has somehow managed to forget that the first obligation of every court, let alone the highest court in the state, is justice. At some point the Court's desire, be it misguided or noble, to eliminate perfectly valid claims in order to reduce the court's caseload must surrender to the twin goals of fairness and due process. The New Jersey Supreme Court has evidently forgotten Lyndon Johnson's exhortation:

> *You do not examine legislation in the light of the benefits it will convey if properly administered, but in the light of the wrongs it would do and the harms it would cause if improperly administered.*

(In this case the issue is a legal doctrine, but the principle is the same.)

Instead of undertaking to protect litigants with meritorious claims, the New Jersey Supreme Court deviously crafted a bureaucratic procedural snare to trap the unwary, made it retroactive, and then, when its handiwork proved to be a manifestly unjust and unworkable experiment, reversed itself two years later, but refused to reinstate the cases dismissed during the years in which the decision was in place.

I seek certiorari for two main reasons:

(1) The non-retroactivity of a decision repealing a retroactive decision leaves many litigants remediless, and violates our right to be free from arbitrary and capricious decisions and violates our right to due process.

(2) Arbitration *cannot* be compelled when not provided for by law or contract, and the New Jersey courts cannot cap an attorney's liability at the fee paid by the client.

I also seek certiorari on the grounds that New Jersey's restrictive Entire Controversy Doctrine is an unconstitutional violation of Due Process and ought to be overturned on that basis alone.

I

New Jersey's "Entire Controversy Doctrine" is a rigid and sweeping doctrine of preclusion, broader and more insidious than any rule adopted by other state. *Olds v. Donnelly*, 150 *N.J.* 424 (1997). The Entire Controversy Doctrine expands the traditional claim preclusion rule — namely that all parties to an action must raise in that action all related claims that *might* exist against other parties — to require the joinder of even non-parties against whom future claims *might* be made, if those claims are even remotely related to the occurrence giving rise to the lawsuit. Joinder is required even when the claim is speculative or when a future cause of action has not yet fully accrued. Failure to join a party prevents litigating against that party at a later date. *Cogdell v. Hospital Center at Orange*, 116 *N.J.* 7 (1989)

While the intent may be reasonable — in that the Entire Controversy Doctrine attempts to avoid piecemeal litigation much as do the party joinder rules in other jurisdictions — the doctrine has been expanded and perverted over the years to bar meritorious claims in a variety of areas.

On August 1, 1995 the New Jersey Supreme Court experimented with the Entire Controversy Doctrine by expanding it to cover malpractice litigation against an attorney. *Circle Chevrolet v. Giordano, Halleran & Ciesla*, 142 *N.J.* 280 (1995). This required joinder of litigation against an attorney by the client to the underlying litigation — in which the attorney was either currently representing the client or had represented at some point — even when the client's claims against the attorney had *nothing* to do with the underlying litigation and even when the damages, if any, had not yet fully accrued or even might not accrue at all. *Circle, supra*. In other words, the New Jersey Supreme Court was requiring immediate joinder of a speculative tort in order to preserve a claim that *might* arise in the future. The *Circle, supra*, decision was made retroactive to all cases either open or on appeal, regardless of whether or not such cases had been filed years before *Circle, supra*, or whether or not the underlying actions had long since been tried.

The ink was not yet dry on the *Circle, supra*, decision before it began to wreck havoc with innumerable attorney malpractice cases in the New Jersey Courts, not to mention ordinary representation of clients in the absence of malpractice litigation. Whenever an attorney made a mistake, no matter how minor, *Circle, supra*, required the attorney to inform the client of the mistake and the client's right to sue the attorney in order to preserve the claim. (*Circle* at 291-292, *Olds* at 442-443.) (This notification, incidentally, did not happen in my case and I suspect that failure to notify the client was a common occurrence. Despite failing to notify me, the tortfeasor attorneys were still able to use *Circle* as a shield.)

Similarly, whenever the client changed attorneys, for whatever reason, the new attorney was forced to join the old attorney to the underlying action to preserve the client's right to sue, just in case

some problem with the representation came to light. Failure to perform joinder resulted in liability for the new attorney. In the case of a mistake — whether important or not — clients were forced to either change attorneys midstream and sue the prior attorney, or retain separate counsel to file a speculative lawsuit against their current attorney while the current attorney was still representing the client, all in order to preserve a future claim should the mistake prove to be significant.

This course of action naturally put attorneys and clients in an adversarial position, even when the long-term importance of the mistake was not yet ascertainable. (After all, the mistake might be of no consequence in that the attorney might win the case despite the mistake, and the client might be perfectly happy with the outcome. Or the Appellate Court might reverse a loss and grant the attorney another chance for success.) Not only would the ongoing litigation destroy the trust essential for the attorney-client relationship, but it would also interfere with the right to counsel since subsequent counsel might not be willing to sue another attorney. (In my case, my new attorney knew one of the attorneys I later sued — he and his firm were well known locally — and my new attorney would not have been willing to participate in litigation against him.)

The problems, however, were far worse for the client than merely creating an adversarial relationship between the attorney and client. Because the client was suing the attorney, the attorney-client privilege was naturally waived in order to allow the attorney to mount a defense. The waiver of privilege is naturally a windfall for the client's adversary since otherwise privileged details of the representation — notably including legal strategies and communications with the client — become public during discovery. Such a course of conduct — that is, the attorney's position of "sue me and I will reveal all your confidences and secrets to your adversary" — amounts to extortion in other circumstances. Furthermore, the attorney now has an incentive to "spin" — the vernacular has a far less polite term — the facts and give testimony so as to benefit his own interests, no matter what harm accrues to the former client's ongoing litigation.

The attorney's defense benefits from the untenable position the client is placed in by way of the joinder. While the underlying matter is progressing the client is forced to defend the attorney's conduct in the underlying matter — in an effort to salvage whatever is possible — while *simultaneously* arguing the essential wrongness of the attorney's conduct in the litigation against the attorney. Conflicting positions like this are naturally difficult to litigate.

While the satellite litigation spawned to preserve future claims was complicating litigation, the dismissal of claims on the grounds that joinder had not been performed — not matter how odious the attorney's conduct — was further victimizing the injured clients and allowing tortfeasors to escape all liability for their wrongful conduct.

On September 29, 1995, approximately one month before trial, my lawsuit was dismissed by the Superior Court. I appealed. Based on the August 1, 1995 expansion of the Entire Controversy Doctrine to cover litigation against an attorney, on January 16, 1997 the Appellate Court upheld the dismissal of my suit against my former attorneys even though there was no way for my new attorney to know in 1992 that a retroactive decision three years hence would require joinder of the Defendants. (Other litigants were similarly victimized by the retroactivity.) As an ordinary person with no prior experience with the law, I was in no position to realize that my new attorney needed to join my former attorneys to the underlying action in order to preserve future claims and I relied entirely upon his efforts.

Unbeknownst to me — and in parallel with my Motion for Reconsideration which was denied by the Appellate Court on February 6, 1997 — the New Jersey Supreme Court heard argument on February 3, 1997 in *three* cases regarding overturning of its earlier *Circle*, *supra*, decision. *Olds v. Donnelly*, 150 *N.J.* 424 (1997). *Karpovich v. Barbarula*, 150 *N.J.* 473 (1997), and *Donohue v. Kuhn*, 150 *N.J.* 484 (1997). The hearing included argument by the litigants as well as by the New Jersey State Bar Association which filed an *amicus* brief for these three cases.

On March 25, almost two months after oral argument for *Olds*, *Karpovich*, and *Donohue*, *supra* — and notably while the New Jersey Supreme Court was still deciding the reversal issue — I filed my Petition for Certification seeking to overturn the joinder requirement. (Petitions were simultaneously being filed for other cases by other litigants. I had absolutely no idea that *any* of the three joinder cases were being decided until over a month *after* the decisions were entered.) My petition was denied on June 17, 1997 while the New Jersey Supreme Court was still deciding what to do about *Olds*, *Karpovich*, and *Donohue*, *supra*.

On July 16, 1997 the New Jersey Supreme Court totally *repudiated* its *Circle*, *supra*, experiment, but made the decision retroactive *only* to those cases still in the pipeline. Because my Petition for Certification was dismissed less than *one month* before the reversal and restoration of the status quo, I — not to mention all other litigants in the "experiment's" two year window — was left totally remediless.

What is particularly interesting is the timing of the dismissal of my Petition for Certification given the case of *Bailey v. Pocaro*, New Jersey Supreme Court Docket Number 43,817. The petition in *Bailey*, *supra*, was filed on April 22, 1997 — about a month *after* my Petition for Certification was filed — with certification being granted on July 16, 1997 — about a month *after* my Petition for Certification was denied — with the disposition being a reversal and remand "in light of *Olds v. Donnelly*". This case, not to mention the timing of the decision, is of particular importance because the appellant's attorney, Robert H. Jaffee, Esquire, was exceedingly outspoken in his attacks on the *Circle*, *supra*, decision. (See "Braking the Juggernaut", in *New Jersey Law Journal*, 147 *N.J.L.J.* 1237, March 17, 1997.) The squeaky wheel clearly gets the grease.

The New Jersey Appellate Court is currently reversing numerous dismissals based upon the repeal of *Circle*, *supra*, and remanding the cases for trial. For example, see *Davis v. Bernard*, A-2303-96T5, reversed and remanded on September 4, 1997, *Jablonski v. Robinson*, A-4604-95T2, reversed and remanded on

September 19, 1997, and *Goralczyk v. Olesnycky*, A-6639-95T3, reversed and remanded on September 23, 1997. All of these cases dealt with legal malpractice claims dismissed on summary judgment based on *Circle, supra*, but subsequently reversed in light of *Olds v. Donnelly, supra*.

What is particularly interesting is that these cases are *not* being reported, just as the myriad of dismissals based on *Circle, supra*, were *not* reported. (What better way to conceal the massive violations of due process than to fail to report the cases.)

While some cases are now being reversed and remanded for trial, plaintiffs at both ends of the period during which *Circle, supra*, was in force — beginning with the August 1995 dismissal of *Circle, supra*, and roughly ending with the rejection of my Petition for Certification suit in June of 1997 — *cannot* get our cases reinstated since the retroactivity was deliberately limited by the New Jersey Supreme Court. This means that the reversal selectively — and deliberately — victimizes a class of litigants in order to protect the New Jersey Supreme Court from embarrassment, a clear violation of due process and our constitutional rights.

II

In addition to the Entire Controversy Doctrine issue, there is another issue. The Courts in New Jersey are holding that litigation by a client against an attorney for fraud and breach of ethical and fiduciary duty may *not* be litigated, and instead must go to the State's Bar Association for fee arbitration and disciplinary action, and that an attorney's liability is therefore capped at the fee paid by the client. Such a cap has *never* been enacted by the legislature and is a violation of my due process right of access to the courts.

III

Finally, in addition to the above, the Entire Controversy Doctrine is itself a violation of Due Process and ought to be overturned on those grounds. No other state has seen fit to craft rules which seem designed to allow tortfeasors to escape liability.

History

A brief review of the facts is made only to establish the context for the litigation against my attorneys, in that what the Defendants did to me — representing me and the Co-Defendant even though a conflict of interest existed and the underlying matter involved allegations of conspiracy and R.I.C.O., making the disclosures in violation of the attorney-client privilege in order to harm me, billing fraud by shifting costs from one client to another and in obtaining a high billing rate through deception, deliberately inflating legal bills, etc. — is totally unrelated to the underlying matter in which they represented me, and that I not only have damages which *cannot* be remedied by fee arbitration, but such damages entitle me to a trial on the issues.

1991: Facstore litigation.

My suit against my former attorneys, for fraud and breach of ethical and fiduciary duty, grows out of their representation of me for over a year in the matter of *Facstore v. Chandross, Mahler, et. al.*. (New Jersey Superior Court Docket Number: UNNL-4536-91, Appellate Docket Number: A-1162-93-T3, Certification Denied June 17, 1997)

In June of 1991 a New Jersey Company named "Facstore" filed an eight count Complaint against me, one Paul Mahler, and several fictitious persons and corporations alleging racketeering (R.I.C.O.), conspiracy, conversion, and unfair competition, and seeking injunctions, monetary damages, constructive trusts, and penalties. The crux of Facstore's Complaint was that I and the Co-Defendant had stolen its physical and intellectual property, started a competing business, and had otherwise conspired to damage it. (The issue at trial finally boiled down to whether or not materials had been removed from Facstore's place of business and whether or not I had conspired with the Co-Defendant in the alleged removal, since the alleged competing business and other defendants were found to be totally imaginary.)

On or about August 9, 1991 I met with Defendant Arena, an attorney at the Defendant law firm, to discuss representation in the Facstore matter. Having no prior experience with the legal system or any knowledge of it — my formal training is in Computer Science and Computer Engineering — I naively believed Defendant Arena when she explained that dual representation of me and the Co-Defendant would save time and money. No explanation of the existence of the "conflict of interest" existing between me and the Co-Defendant was *ever* made by the Defendants at any time during the period they represented me. During our initial meeting Defendant Arena informed me that she had extensive experience in conspiracy and R.I.C.O. cases, and that she and the firm handled them "all the time". Defendant Arena also stated that she had to obtain Defendant Levin's approval before undertaking any representation of new clients.

Defendant Arena then sent me a retainer agreement, providing for a $200 per hour billing rate and a $7,500 retainer. Based on her representations as to her and her firm's skills, experience, and expertise, I signed the agreement and forwarded a retainer. On or about August 12, 1991 Defendant Arena and her firm began to represent me and the Co-Defendant.

1991: Conflict of Interest

From the start of the representation, and throughout it, my interests were regularly subordinated to those of the Co-Defendant, although I did not learn of this until *after* I obtained a new attorney over a year later and for the first time received independent advice. Exploitation of the conflict included the Defendants being precluded from making reference to, or assertions regarding, the Co-Defendant's admitted actions or his liability for same, as well as having me pay — without my knowledge or consent — the costs for the Co-Defendant's legal defense.

The conflict became overwhelming in May of 1992 when Facstore offered me a Conditional Settlement Proposal that relegated me to un-indicted co-conspirator status, gave Facstore the option of

re-opening its litigation against me, and required further expense on my part, all without any compensation flowing to me. Rather than give independent advice or withdraw from the case, the Defendants put enormous pressure on me to accept this offer, as removing me from the case — no matter what the cost to me — would eliminate the R.I.C.O. and conspiracy charges against the Co-Defendant, dramatically simplifying his defense, not to mention simultaneously curing the conflict of interest. This illustrates the classical problem with dual representation.

During her Deposition Defendant Arena testified as to the impact my actions were having on the Co-Defendant's defense (DA-P174-L13):

Q **What effect did the plaintiff's refusal to accept the settlement proposal have on your representation of Paul Mahler?**

A **It had the effect of keeping the litigation going and all the issues and all the allegations still unresolved. Had the settlement proposal been accepted, it would have helped Mr. Mahler because all the conspiracy issues would have been out the window.**

Q **Would it have greatly benefited Paul Mahler?**

A **Probably to a great extent. The only issue left would have been damages.**

1992: Defendants Withdraw as Counsel

After I would not accept the Conditional Settlement Proposal, because of the risks associated with it, Defendant Arena began to neglect the case. On or about August 12, 1992 I telephoned Defendant Levin, a senior partner at the Defendant law firm, to discuss my concerns. Defendant Levin directed me to find new counsel, representing that he felt Defendant Arena had proceeded properly and that I had received good value for the money paid to his firm.

I immediately began searching for new counsel, and a few days later I dropped off materials for review with Edwin M. Dotten, Esquire, the attorney who subsequently represented me in the Facstore litigation. Rather than wait for me to obtain new counsel, contact me to learn the status of my search, or to ask that I consent to their being relieved, the Defendants were so angry that I had questioned the quality of their representation and were so anxious to conceal the conflict of interest and their other unethical conduct, that they filed a Motion to be Relieved as Counsel on or about August 26, 1992 blaming me for their obvious mishandling of the case.

In the attached Certifications, the Defendants maliciously revealed secret and confidential information, including their opinions that my Counterclaim was worthless, and that my adversary's Conditional Settlement Proposal should have been accepted:

> 3. **...While I believed the counterclaims to be of limited value, they were nonetheless asserted at client's behest.**
>
> ...
>
> 9. **...Despite my strong recommendation that the [Conditional Settlement] offer be accepted, Jonathan A. Chandross refused to accept it.**

Both the Motion and Certifications were sent to my adversary's attorney in an effort to punish me and destroy my bargaining position. Defendant Arena subsequently filed my detailed legal bills with the Court and sent them to my adversary. The Defendants' Motion was granted on September 25, 1992.

1993: Trial and Ensuing Appeals

Meanwhile my new counsel tried to clean up the mess as best he could. The Facstore matter went to trial, and on June 22, 1993, after eight days of trial, I prevailed in a directed verdict. I recovered approximately $3,500 on my Counterclaim while *the Co-Defendant was found liable for over $42,000 in damages for*

removing Facstore's property. This proves that our interests, and our liability, were not identical.

In its Appeal Briefs, Facstore regularly argued that the dual representation proved its allegations of conspiracy, and that had I followed Defendant Arena's advice, *as disclosed in her certification*, that the suit would have ended and that I would not have suffered litigation related damages including litigation costs (Appellate Brief, page 9):

> **As noted in Chandross' attorney's motion to withdraw as counsel, the counterclaims were of "limited value" (Pa6 at 3) and Facstore's offer of settlement was generous and should have been accepted.**
>
> **...**
>
> **Had Chandross accepted what can fairly be described as a generous offer (as his attorney repeatedly suggested), the matter would have ended, and Chandross would not have had any other attorney's fees.**

1994: Filing of Lawsuit Against Defendants

On or about August 23, 1994, within the two year statue of limitations for personal injury claims, I filed a Complaint against the Defendants. (APPENDIX A) Discovery commenced, documents were exchanged, and Depositions were taken.

September 29, 1995: Dismissal of Lawsuit Against Defendants

On August 1, 1995 the New Jersey Supreme Court ruled that litigation against an attorney must be joined to the underlying action in which the attorney represented the client, even when the matters are factually unrelated and where the attorney's conduct

did *not* give rise to the underlying action. *Circle Chevrolet v. Giordano, Halleran & Ciesla*, 142 *N.J.* 280 (1995). This decision was an expansion of the state's highly restrictive "Entire Controversy Doctrine" which requires joinder of all parties to a lawsuit. Following its usual practice, this decision was made retroactive to all pending cases and those on appeal.

With the ink barely dry on the August 1, 1995 *Circle, supra*, decision, the Defendants in this case specifically relied upon it in their August 18, 1995 Motion for Summary Judgment. The *Circle, supra*, decision was so recent, in fact, that I was forced to obtain a copy from an on-line legal service in order to respond to the Defendants' motion. The Motion was heard on September 29, 1995, approximately one month before trial.

The Honorable Judge Toy of the Superior Court of New Jersey granted the Defendants' Motion on September 29, 1995 (APPENDIX B, APPENDIX C), ruling that my *sole* remedy for the fraud perpetrated on me by my former attorneys, the irreconcilable conflict of interest which caused them to sell out my interests for the Co-Defendant's, the deliberate breach of the attorney-client privilege, the deliberate fraud in billing, and the other unethical conduct, was to go to the District Ethics Committee to obtain fee arbitration and disciplinary review (M-9-29-1995-P9-L19):

> **Maybe it's like a crime. Maybe you're not meant to be compensated, it's just that they're meant to be disciplined if there were unethical conduct.**

In other worse, an attorney has no liability for a tort. (The ultimate "Get out of Jail Free" card.) This is ludicrous, and so I appealed.

January 16, 1997: Appellate Court affirms on grounds that the New Jersey's restrictive Entire Controversy Doctrine requires joinder of Defendant attorneys to underlying action.

The Appellate Court upheld the decision on January 16, 1997 (Motion for Reconsideration denied February 6, 1997) saying that my claim was barred under New Jersey's Entire Controversy doctrine because my new attorney should have somehow *anticipated* in August of 1992 when he began representing me that an August 1, 1995 decision would require him to join the Defendants to the underlying action, with trial commencing in June of 1993.

In its opinion (APPENDIX D), the Appellate Court ruled:

> We affirm substantially for the reasons expressed by Judge Toy in his oral opinion and **because the claim is barred by the Entire Controversy Doctrine. Although the issue was raised before Judge Toy, he did not address the doctrine issue. We are satisfied the doctrine bars plaintiff's complaint.**

March 20, 1997: Introduction of Bill to legislatively repeal the application of New Jersey's restrictive Entire Controversy Doctrine to attorney malpractice cases.

The joinder problem became so intolerable, both to litigants and members of the bar alike, that something had to be done. Into this void stepped New Jersey State Senator Gerald R. Cardinale, who introduced Bill S.1925 (APPENDIX H) to safeguard a client's right to sue his attorney without joinder by *legislatively overturning* the New Jersey Supreme Court's decision in *Circle*, *supra* (APPENDIX H):

> **1. No claim against an attorney alleging legal malpractice shall be brought or asserted until all appeals arising from the cause of action underlying the malpractice claim have been fully exhausted or until there has otherwise been a**

> **final adjudication or other legally binding resolution or termination of that cause of action.**

The New Jersey Supreme Court must have been greatly concerned, since the bill would, if enacted, erode the Court's power and otherwise disturb the balance of power between the three branches of government. [1] The constitutionality of this bill is unknown, but it is likely that the New Jersey Supreme Court would not tolerate such an inroad into its power.

February 3, 1997: New Jersey Supreme Court hears argument in three cases regarding overturning of joinder requirement.

Unbeknownst to me — and in parallel with my Motion for Reconsideration which was denied by the Appellate Court on February 6, 1997 — the New Jersey Supreme Court heard argument on February 3, 1997 in *three* cases regarding overturning of its earlier *Circle*, *supra*, decision. *Olds v. Donnelly*, 150 *N.J.* 424 (1997), *Karpovich v. Barbarula*, 150 *N.J.* 473 (1997), and *Donohue v. Kuhn*, 150 *N.J.* 484 (1997). The hearing included argument

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1 In *Winberry v. Salisbury*, 5 *N.J.* 240 (1950) the New Jersey Supreme Court asserted its supremacy over court practice and procedure. What is curious is that the Court wrote that procedure should be made:

> **"subsidiary . . . to the substantial rights of the litigants. The courts may avoid the snarls of procedural red tape and concentrate on the substantive questions at issue." 5 N.J. 240, 254 (1950).**

This decision was made in response to an effort by the New Jersey Legislature to enact court rules into law by statute.

by the parties as well as by the New Jersey State Bar Association which filed an *amicus* brief.

March 25, 1997: Petition for Certification filed with New Jersey Supreme Court.

The Appellate Court's decision obviously required a time machine, since it is otherwise impossible to comply with the 1995 *Circle, supra*, decision back in 1992 when the underlying case was proceeding. On March 25, 1997 I therefore filed a Petition for Certification with the New Jersey Supreme Court.

June 17, 1997: Petition for Certification is denied.

On June 17, 1997 my Petition for Certification was denied. I still had no knowledge that the New Jersey Supreme Court was simultaneously considering reversing *Circle, supra*, and that it had heard argument in three cases, or that S.1925 had been introduced to legislatively repeal *Circle, supra*.

July 16, 1997: New Jersey Supreme Court reverses itself and eliminates requirement that attorney malpractice claims be joined to the underlying litigation, but grants retroactivity *only* to cases still open.

On July 16, 1997 — less than two years after the original decision in *Circle, supra*, the New Jersey Supreme Court decided that its "experiment" had failed and *reversed* its own decision. *Olds v. Donnelly*, 150 *N.J.* 424 (1997). Also see: *Karpovich v. Barbarula*, 150 *N.J.* 473 (1997) and *Donohue v. Kuhn*, 150 *N.J.* 484 (1997). In my opinion, the New Jersey Supreme Court prudently decided it was better to endure the minor humiliation of reversing itself rather than to go to war with the legislature. Once again, the usual practice of making the decision retroactive to all cases still in the New Jersey courts was followed. This is where the problem, and my

reason for seeking certiorari, comes in.

The New Jersey Supreme Court, deliberately *denied* my Petition for Certification on June 17, 1997, *less than one month before it reversed its own decision.* As the Court ought to have known that such a reversal was planned, I can only conclude the denial was done in order to clear the court calendars of the myriad of cases that would otherwise proceed to trial. The perceived embarrassment ensuing from a slew of reinstatements was obviously too much for the court, and justice had to take a backseat to public relations.

In support of this somewhat audacious contention I rely upon the Court's own opinion in *Olds v. Donnelly, supra* (at 450):

> **Complete retroactivity, however, potentially would expose the judicial system to the undue burden of resolving numerous concluded matters.**

and (at 452-453):

> **This term alone our Court will issue published opinions in six party-joinder entire controversy appeals and will have reviewed numerous petitions for certification raising similar issues.**

Had the Court waited a mere *thirty days* my suit would have been reinstated, since the basis for its earlier dismissal had been rendered invalid.

The Court's position is clear: everyone prior to August 1, 1995 was able to sue their attorney without joinder, and everyone whose case had not been rejected by July 16, 1997 is allowed to go forward, including those who either deferred filing suit until *Circle, supra*, was repealed or because it was obvious that the joinder requirement barred the filing of a suit. Those with cases dismissed in this small window — notably those who filed lawsuits quickly rather than delay until the eve of the statute of limitations — are told, in effect:

> *It would take too much time to hear all the cases we dismissed without trial up because of our "experiment", so the*

dismissals will not be disturbed. Have a nice day.

Yet the Court wonders why people have no respect for it?

In *Fischer v. Canario*, 143 *N.J.* 235, (1996) the New Jersey Supreme Court set forth the four different types of retroactivity available to it, including that applied *to cases where final judgments have been entered* (at 244):

> **This Court has held that in determining whether to apply a new rule prospectively or retroactively a court may follow one of four options: ... (4) give the new rule complete retroactive effect, applying it to all cases, even those where final judgments have been entered and all avenues of direct review exhausted.**

This would be the just decision. I spent tens of thousands of dollars on discovery and legal advice before my suit was dismissed, not to mention literally thousands of hours of my time, and the *only* "burden" placed on the courts for my case will be a weeks worth of trial to which I am *entitled as of right*. My case was, after all, on the very eve of trial when the New Jersey Supreme Court made its "experiment" retroactive. It is *not* the case that a burdensome retrial is needed; *I have never had a trial because my suit was dismissed under a doctrine that was subsequently repudiated.* This applies equally to the other dismissals. Cases dismissed on appeal, such as *Circle*, *supra*, are trivially fixed simply by reinstating the trial verdicts. (There can be no burden at all in cases where trial has concluded.)

The retroactivity issue *also* leaves me remediless in another fashion. As set forth earlier, my new attorney failed to anticipate that joinder of the Defendants to the underlying action would be required in order to preserve my claim against them. As my suit against the Defendants was dismissed for such failure, I now have a valid cause of action against that attorney. The attorney, however, can now raise a defense that he can in no way be liable for failing to follow a doctrine which was retroactively repealed.

(Some catch, that Catch-22.) I have been informed that the Plaintiff in *Circle, supra*, is currently suing the attorney who failed to join the defendants in that case, and that the attorney is asserting such a defense.

REASONS FOR GRANTING THE WRIT

Due process requires that the laws, Rules of Court, and Court decisions not be capricious and arbitrary.

It is well settled that due process demands that the laws of the land and the Rules of Court must not be capricious and arbitrary. New Jersey's Entire Controversy Doctrine violates this requirement. There is regular dissent in the New Jersey Supreme Court's party joinder decisions by the Honorable Justice Stein — who notably cites his responsibility for the original joinder decision — because of the effects the Court's preclusion of valid claims is having on the state's litigants. *Prevratil, et al. v. Mohr*, 145 *N.J.* 180 (1996) Excerpts from the Honorable Justice Stein's dissent appear in (APPENDIX K).

Court cannot impose arbitration on a class of citizens, thereby denying the right of access to the courts, when such arbitration is not provided for by law or contract.

The retainer agreement between me and the Defendants — which is a contract — does not provide for arbitration under any circumstances, and yet the New Jersey courts are, in essence, ruling:

> *No matter what misrepresentations are made by an attorney so as to secure a fee, no matter how the attorney violates the client's right to undivided loyalty, no matter how the attorney puts his or her interests ahead of the client's, no matter how the attorney acts so as to damage the client, nor matter*

what violations of the law or of the Rules of Professional Conduct occur, the client's **sole** *remedy is fee arbitration by the District Ethics Committee.*

This is a clear violation of my right to Equal Protection and Due Process under the United States Constitution because the New Jersey courts are denying the class of citizens who sue attorneys the right of access to the Courts, instead ordering them to go to the District Ethics Committee. The Fourteenth Amendment clearly prohibits the state from creating classes which receive preferential treatment in the courts. This suggests the question: What is the court's motivation in granting attorneys privileged status as tortfeasors?

The severely limited scope of the District Ethics Committee's fee arbitration committee was clearly delineated by the New Jersey Supreme Court in *Saffer v. Willoughby*, 143 *N.J.* 256, (1996) (at 265, emphasis added):

> A Fee Committee has jurisdiction only "to arbitrate fee disputes between clients and attorneys." R. 1:20A-2(a). The rules specifically provide that **the "fee committee shall not have jurisdiction to decide ... claims for monetary damages resulting from legal malpractice, ...**

Eliminating the right of access to the courts and compelling fee arbitration effectively caps an attorney's liability at the feed paid and thereby grants privileged status to attorneys as tortfeasors. Imagine what would happen if the American Medical Association was able to limit all damages in a medical malpractice case to the fees paid to the physician, with the AMA also handling the fee arbitration. There is an old doctrine that seems to apply here:

Nemo sibi esse judex vel suis jus dicere debet.

(No man ought to be his own judge, or to administer justice in cases where his relations are concerned.) It is no wonder that the public view attorneys and the courts with such suspicion and hostility.

No other profession has been granted such an exemption from the laws of New Jersey, and no other class of litigants is prevented from accessing the courts.

> An attorney's failure to give a client undivided loyalty is an element of damage, and the dispute over whether or not a conflict existed establishes an issue in controversy that cannot be resolved as a matter of law.

My position has always been that the dual representation in the presence of a conflict of interest is an element of damage because I did not receive the independent and impartial advice I had a *right* to expect and was *paying $200 per hour for.*

During her Deposition Defendant Arena testified that she would have to suppress any information prejudicial to the Co-Defendant because of the dual representation (DA-P97-L6):

Q **If there was information that put Paul Mahler in a bad light, could that be brought into the case by you when you were representing both the plaintiff and Paul Mahler?**

A Could it be brought into the case by me?

Q By you.

A **I would try to keep it out if possible.**

Q Why would you try to keep it out?

A **If it was prejudicial to either one of you I would have tried to keep it out. Why would I bring it into the case voluntarily? I'm not understanding.**

This is, after all, the key. The Defendants did not "understand" the consequences of dual representation or the limitations placed

on the attorney, or that advancing one client's cause might harm the other client.

That the above testimony illustrates the insidious effects of dual representation is born out by the findings of this very court in *Wheat v. United States*, 486 *U.S.* 153 (1988) (at 149, ellipses in original):

> **Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. ... [A] conflict may ... prevent an attorney from challenging the admission of evidence prejudicial to one client but perhaps favorable to another, or from arguing at the sentencing hearing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another.**

The American Bar Association's Ethics Opinions contain an opinion which, while not binding on any court, is nonetheless relevant as it deals with an attorney who has evidence which exculpates one client while implicating the other. (APPENDIX J).

The Honorable Judge Toy specifically *acknowledged* the conflict of interest before dismissing my complaint (M-9-29-1995-P25-L6):

> **They did so incorrectly in that there was dual representation.**

(M-9-29-1995-P14-L23):

> You know, you keep saying that over again and **there's no doubt there was a conflict.**

(M-9-29-1995-P8-L8):

> Chandross Your Honor, the Rules of Professional Conduct state that when dual representation is to be undertaken,

the client has to be notified. No notification occurred.

The Court It didn't happen ...

When the Defendants failed to force me to accept the Conditional Settlement Proposal, so as to benefit the Co-Defendant's defense, they simply "cured" the conflict by abandoning the representation. Replacement counsel had to spend time — which is my money — familiarizing himself with the case and in trying to undo the damage done by the Defendants.

The New Jersey courts have consistently failed to consider the significance and *requirements* of New Jersey's Rules of Professional Conduct — which are based on the American Bar Association's ethics rules — specifically RPC 1.7(b)(2) which provides for dual representation only when:

> **..the client consents after a full disclosure of the circumstances and consultation ... the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.**

This never happened: *no* such explanation ever occurred and *no* such consent was ever given. Furthermore, the Defendants also billed me for legal services rendered to the Co-Defendant; I certainly would *not* have consented to this.

My adversary repeatedly relied upon dual representation as *proof* of its alleged conspiracy between me and the Co-Defendant (Appeal Brief, page 13, emphasis added):

> Moreover, **the court below astutely noted that Chandross and Mahler were originally represented by the same attorney**, and that since it was clear that either one or both of them took the equipment, **Facstore could have easily believed that they were acting in concert ...**

Defendant Arena testified at her Deposition that she did not believe there to be any conflict of interest because *I did not point one out to her* (DA-P91-L20):

> **Q Did you believe that there was any conflict of interest existing between plaintiff and Paul Mahler before you undertook the joint representation?**
>
> **A No. No such conflict was ever presented to me by either one of them.**

In other words, the Defendants claim that it is the *client's* responsibility to have greater knowledge of legal ethics than the attorney representing that client. This ignores the dictates of the New Jersey Supreme Court's opinion in *Baldassare v. Butler*, 132 *N.J.* 278 (1993) (at 291):

> **It is the attorney's responsibility to avoid conflicts of interest, and if the attorney fails to do so, it is the attorney and not the innocent client who will be liable to any injured client.**

Furthermore, the Defendants continually assert that their "agreement" *solely* with the Co-Defendant (APPENDIX F) as to the defenses he would raise somehow exculpated me or in some other fashion shielded me from the consequences of the Co-Defendant's *admitted* actions, and that this "agreement" shields them from liability in this case. The Honorable Judge Sachar, who heard the underlying case of *Facstore v. Chandross, Mahler, et al*, made a ruling *in this case* that the Co-Defendant's agreement with the Defendants (PA-F) was *irrelevant because of the issue of credibility regarding the Co-Defendant's alleged involvement in criminal activity.* (APPENDIX G).

The New Jersey Supreme Court set forth specific requirements in *In re Lanza*, 65 *N.J.* 347 (1974) (at 355):

> **Thus, with rare and conditional exceptions, the lawyer may not place himself in a position where a conflicting**

> **interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship.**

In *Haynes v. First National State Bank of N.J.*, 87 *N.J.* 1963 (1981), the New Jersey Supreme Court decided even the *possibility* of conflict of interest was a breach of an attorney's ethical duty:

> **A conflict of interest, moreover, need not be obvious or actual create an ethical impropriety. The mere possibility of such a conflict at the outset of such a relationship is sufficient to establish an ethical breach on the part of the attorney.**

In *Nappe v. Anschelewitz, Barr, Ansell & Bonello*, 97 *N.J.* 37 (1984) the New Jersey Supreme Court specifically found that damage is *presumed* in a case involving an invasion of a legal right (at 47-48):

> **The general rule is that whenever there is a breach of contract, ... or an invasion of a legal right, the law ordinarily infers that damage ensued, and, in the absence of actual damages, the law vindicates the right by awarding nominal damages.**

Furthermore, compensatory damages are *not* required as a basis for a punitive damage assessment (at 50):

> **Because of the fortuitous circumstances that an injured plaintiff failed to prove compensatory damages, the defendant should not be freed of responsibility for aggravated misconduct. People should not be able with impunity to trench wilfully upon a right. Moreover, it is especially fitting to allow punitive damages for actions such as legal fraud, since intent rather than mere**

> **negligence is the requisite state of mind.**

(at 51):

> **We therefore hold that punitive damages may be assessed in an action for an intentional tort involving egregious conduct whether or not compensatory damages are awarded, at least where some injury, loss, or detriment to the plaintiff has occurred.**

(at 60):

> **It has generally been accepted that to sustain an action for misrepresentation a claimant must have suffered damages, but this statement seems to mean nothing more than that the claimant must have received something different from what was bargained for.**

I *bargained* for attorneys with *extensive* prior experience who would represent *me* and advance *my* interests with *undivided loyalty*. I clearly did not receive what I bargained for *and paid $200 per hour with a $7,500 retainer for*. I would *never* have paid $200 for an attorney with as little experience as Defendant Arena had, nor would I have paid that rate for divided loyalty and suspect advice. Neither would I have paid such a sum if I knew the Defendants were going to deliberately inflate and pad their bills in order to increase the hourly billing. I certainly would not have paid such a rate had I know that malicious and vindictive disclosures would be made.

> An attorney's deliberate violation of the attorney client-privilege in order to punish the client is an element of damage, and thereby establishes an issue in controversy.

The Courts in New Jersey are holding that a client really does not have a right to the attorney-client privilege in a civil matter, and that when the privilege is violated by the attorney, the attorney has no liability.

Rather than withdraw gracefully, or seek my consent to be relieved, the Defendants *deliberately* revealed secret and confidential information — namely that they felt that my Counterclaim was very weak and that I should have accepted a Conditional Settlement Proposal — so as to harm me for calling Defendant Arena "incompetent". The Defendants subsequently made public my itemized legal bills and sent them to my adversary. These disclosures fortified my adversary and were used against me in the legal proceedings.

Such conduct clearly violates New Jersey's RPC 1.8(b) and N.J.S.A. 2A:84A-20. A client has a *legal right* to expect that confidential communications will remain so. *State v. Kociolek*, 23 *N.J.* 415 (1957).

The American Bar Association Lawyer's Manual on Professional Conduct contains a highly relevant decision, even though it is not binding on any court. Formal Opinion 93-370 instructs attorneys that the disclosure of the client's settlement position is *prohibited without the client's consent because it damages the client* (APPENDIX I). In the instant case, any possibility that I could arrange a favorable settlement was totally *obliterated* by the Defendants' unauthorized disclosures. There is an old doctrine that applies here:

Nemo tenetur armare adversarium contra se.

(No man is bound to arm his adversary against himself.) This is certainly what happened.

CONCLUSION

How can the general public have *any* confidence in the legal system given the way I, and other litigants, have been treated? The New Jersey Supreme Court whipsaws between requiring joinder and then not requiring it, first making a decision retroactive and

dismissing ongoing cases but then failing to undo the harm by reinstating all cases wrongly dismissed after it changes its mind and reverses the joinder requirement.

While some cases are now being reversed and remanded for trial, plaintiffs at both ends of the period during which *Circle, supra*, was in force — beginning with the August 1995 dismissal of *Circle, supra*, and roughly ending with the rejection of my Petition for Certification suit in June of 1997 — *cannot* get our cases reinstated since the retroactivity was deliberately limited by the New Jersey Supreme Court. This means that the reversal selectively — and deliberately — victimizes a class of litigants in order to protect the New Jersey Supreme Court from embarrassment, a clear violation of due process and constitutional protection.

The issue of not being able to proceed with a suit against an attorney for malpractice and fraud is a serious one given public perception of the cozy relationship between attorneys and the Courts, and the perception that attorney misconduct is routinely excused by the courts. The New Jersey Appellate Court addressed the public's lack of faith in the legal profession in *Cohen v. Radio-Electronics Officers*, 275 *N.J. Super* 241 (A.D. 1994) (at 263):

> **The issue must be considered in a broader setting. It is a sad fact that the legal profession is viewed with suspicion by a substantial segment of the public. If their pronouncements are to be believed, many no longer distinguish between the noblest profession and the oldest profession.**

The United States Federal Courts have held that the attorney-client relationship is a special one and that the courts *must* protect the clients from unscrupulous attorneys. In *Stockton v. Ford*, 52 *U.S.* (11 How.) 232, 247, 13 *L. Ed.* 676 (1850):

> **There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, ... few more anxiously guarded**

> **by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it.**

This protection has never been provided to me, and I therefore seek reversal and remand for a trial on the issues.

Given the circumstances and allegations in the Complaint filed, and the facts and circumstances, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

Jonathan A. Chandross
Pro Se
14 Hunterdon Boulevard
Murray Hill, NJ 07974
(908) 464-0415

Petitioner, Pro Se

November 4, 1997

APPENDIX A

Attorney for Plaintiff:
Jonathan A. Chandross, PRO SE
14 Hunterdon Boulevard
Murray Hill, NJ 07974
(908) 464-0415

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – UNION COUNTY
Docket No.: UNN-L-5221-94
Civil Action

COMPLAINT AND DEMAND FOR JURY TRIAL

JONATHAN A. CHANDROSS
Plaintiff

vs.

MARIA ARENA;
JOSHUA LEVIN;
and LEVIN, CLANCY, FOSTER, & ARENA
Defendants

JONATHAN A. CHANDROSS, an individual residing at 14 Hunterdon Boulevard, Murray Hill, New Jersey, states by way of complaint:

FIRST COUNT

1. Prior to August 9, 1991, Plaintiff and a Paul Mahler were named as Defendants in a Superior Court action wherein Facstore, Inc. was Plaintiff, said action being in the Law

Division, Union County, Docket No. L-4536-91.

2. The Amended Complaint filed in the above stated matter included charges against both Plaintiff and the said Paul Mahler as being involved in conspiracy, racketeering, and otherwise acting in concert to the damage of Facstore, Inc., said proceedings seeking compensatory and punitive damages, plus attorney's fees and costs.

3. Also prior to August 9, 1991, Defendant Maria Arena was a licensed practicing attorney in the State of New Jersey; associated with the law firm of Levin & Chenkin, with offices maintained at 70 South Orange Avenue, Livingston, New Jersey and she represented to Plaintiff that she was skilled in litigated matters and handled all the litigation for the law firm.

4. Also prior to August 9, 1991, Defendant Joshua Levin was a licensed practicing attorney in the State of New Jersey; associated with the law firm of Levin & Chenkin, with offices maintained at 70 South Orange Avenue, Livingston, New Jersey and he represented to Plaintiff that Defendant Maria Arena was skilled in litigated matters and handled all of the litigation for the law firm.

5. Also prior to August 9, 1991, Levin & Chenkin was a professional partnership and/or corporation of lawyers organized and existing under the laws of the State of New Jersey for the purpose of practicing law. In 1992, while still representing Plaintiff, Levin & Chenkin became the Levin, Clancy, Foster & Arena subject to this complaint. Defendant Law Firm has its principal place of business located at 70 South Orange Avenue, Livingston, New Jersey.

6. On or about August 9, 1991, Defendant Maria Arena agreed that her law firm would represent both Plaintiff and Paul Mahler in the action instituted by Facstore, Inc. by answering the Complaint, filing a Counterclaim for each of them, and generally representing both as clients throughout the litigation process.

7. The aforesaid representation by the law firm of Levin & Chenkin was agreed to be on a hourly basis with a retainer to be paid in advance. The retainer was in fact paid and accepted by the law firm of Levin & Chenkin.

8. The Defendant law firm did in fact file Answers to the Amended Complaint served by Facstore, Inc. and Counterclaims on behalf of Plaintiff and the said Paul Mahler, and otherwise proceeded with the representation of Plaintiff and Paul Mahler during the course of the litigation.

9. Thereafter the law firm of Levin, Clancy, Foster & Arena was substituted as counsel for Plaintiff and Paul Mahler, with Defendant Maria Arena continuing to represent both of them.

10. Until June of 1992, neither Defendant Maria Arena nor any member of her law firm at any time informed Plaintiff that the dual representation in any way diluted the complete and proper representation of Plaintiff, or in any way made it impossible for her or her law firm to provide exclusive fidelity and loyalty to the Plaintiff.

11. In early June of 1992 Maria Arena urged the Plaintiff to accept a settlement proposed by the attorney for Facstore, Inc., per letter submitted on May 28, 1992. The settlement proposal: (a) provided for no monies to flow to the Plaintiff for his Counterclaim; (b) provided for no monies to flow to the Plaintiff for his litigation costs; (c) required that Plaintiff dismiss his Counterclaim; (d) required that Plaintiff waive his rights to discovery; (e) required that Plaintiff be deposed at his expense; (f) would not necessarily end the litigation against Plaintiff; (g) and required other conditions to be met. The litigation was to proceed against Paul Mahler. The settlement proposal was unacceptable to Plaintiff.

12. All Defendants had a duty of fidelity and loyalty, and a professional obligation to notify Plaintiff, prior to undertaking any dual representation, of the following:

(a) The full nature and extent of the conflict of interest that existed between Plaintiff and Paul Mahler by reason of the allegations contained in the Amended Complaint filed by Facstore, Inc. from both a legal and factual point of view.

(b) The general consequences resulting from such a conflict of interest.

(c) The specific consequences of having a single attorney or single law firm represent both Plaintiff and Paul Mahler because conspiracy, racketeering, and acting in concert were stated causes of action.

(d) That the law firm would not be able to file a Cross-Claim or other pleadings whereby Plaintiff could seek relief from the Co-Defendant Paul Mahler.

13. The Plaintiff only became aware of the magnitude of the prejudicial situation created by the conflict of interest when he and Paul Mahler were required to seek new counsel (as hereinafter set forth), over a year after the law firm began representing them, and they were informed immediately that it would be improper and unethical for the same attorney or the same law firm to represent both parties because of the allegations involving conspiracy, racketeering, and otherwise acting in concert, that were asserted by Facstore, Inc. in its Amended Complaint.

14. In fact, Defendants' conduct in proceeding with dual representation was exploited by Facstore, Inc. in subsequent pleadings to the damage and detriment of the Plaintiff.

15. Throughout their representation of both Plaintiff and Paul Mahler, the Defendants repeatedly exploited the dual representation to the benefit of Paul Mahler.

16. The Defendants' conduct as aforesaid, constitute a deliberate, willful, and wanton violation of: (a) their duties and obligations to the Plaintiff; (b) N.J.S.A 2A:13-4; (c) RPC 1.1; (d) RPC 1.4; (e) RPC 1.7; (f) RPC 1.8; (g) RPC 8.4; (h) the American Bar Association Code of Professional

Responsibility; (i) and the conduct and responsibilities they were generally obliged to discharge as members of the legal profession.

17. By reason of the aforesaid conflict of interest, the Defendants failed to effectively, fully, and properly represent the Plaintiff, and failed to provide exclusive fidelity and loyalty to the Plaintiff.

SECOND COUNT

18. Plaintiff here repeats and incorporates herein each allegation contained in the First Count.

19. During August of 1992, Defendant Maria Arena, with the knowledge, consent, and approval of her law firm and her partner, Defendant Joshua Levin, did:

    (a) Determine to discontinue the legal representation of the Plaintiff and Paul Mahler.

    (b) Communicate such determination to Plaintiff by letter dated August 11, 1992, a copy of which is annexed hereto as Exhibit "A" and made a part hereof.

    (c) Prepare and execute, on or about August 27, 1992, a Certification, a copy of which is annexed hereto as Exhibit "B" and made a part hereof, containing secret and confidential information about Plaintiff's case.

    (d) Thereafter, without communicating with the Plaintiff in any way as to the status of his securing new counsel or whether he would consent to the Defendants' substitution, the aforesaid Certification was attached to a Motion to be relieved as counsel filed with the Court, thereby making it a public record, and also served upon the attorney for Facstore, Inc.

20. On or subsequent to August 27, 1992, Defendant Joshua Levin, with the knowledge, consent, and approval of his law firm, prepared and executed a Certification, containing secret

and confidential information, which was attached to Defendant Maria Arena's Motion to be relieved as counsel filed with the Court, thereby making it a public record, and served upon the attorney for Facstore, Inc. a copy of which is annexed hereto as Exhibit "C" and made a part hereof.

21. By reason of the foregoing, the Defendants did on August 27, 1992, and subsequent thereto, breach their duty of fidelity and loyalty to the Plaintiff by ridiculing the Counter-Claim that they had prepared, at their own urging and on Plaintiff's behalf, and by sending a copy of their statement ridiculing the CounterClaim to the attorney for Facstore, Inc. Defendants' actions were done without any reason, cause, or justification, other than to damage Plaintiff.

22. Also on and subsequent to August 27, 1992, the Defendants breached their professional and legal obligation of confidentiality, and their duty of fidelity and loyalty to Plaintiff, by wrongfully and without authorization revealing secret and confidential information to the Plaintiff's adversaries. Defendants' actions were done without any reason, cause, or justification, other than to damage Plaintiff.

23. Also on and subsequent to August 27, 1992, Defendant Maria Arena breached her professional and legal obligation of confidentiality, and her duty of fidelity and loyalty to Plaintiff, by wrongfully and without authorization offering to reveal secret and confidential information to the Court. Defendant Maria Arena's actions were done without any reason, cause, or justification, other than to damage Plaintiff.

24. On or about September 17, 1992, Defendant Maria Arena, with the knowledge, consent, and approval of her law firm, did file Plaintiff's legal bills with the Court, thereby making them a public record, a copy of which is annexed hereto as Exhibit "D" and made a part hereof. Defendant Maria Arena's actions were done without reason, cause, or justification.

25. The Defendants' conduct as aforesaid, constitute a deliberate, willful, and wanton violation of: (a) their duties and obligations to the Plaintiff; (b) N.J.S.A 2A:84A-20; (c) N.J.S.A 2A:13-4; (d) RPC 1.1; (e) RPC 1.4; (f) RPC 1.6; (g) RPC 1.8; (h) RPC 8.4; (i) the American Bar Association Code of Professional Responsibility; (j) and the conduct and responsibilities they were generally obliged to discharge as members of the legal profession.

26. The conduct of the Defendants as aforesaid was wanton, malicious, vindictive, and with full awareness and knowledge that they were giving aid and comfort to the Plaintiff's adversaries, and that the future of Plaintiff's litigation would be prejudiced thereby, and that Plaintiff would otherwise be damaged.

THIRD COUNT

27. Plaintiff here repeats and incorporates herein each allegation contained in the First and Second Counts.

28. Defendant Maria Arena's failure to demand a jury trial prevented Plaintiff from having his claims evaluated and determined by a jury.

29. Defendant Maria Arena deceived Plaintiff with respect to the technique, procedure, and manner by which her law firm practiced litigation in order to have Plaintiff retain her and her law firm.

30. Defendant Maria Arena deceived Plaintiff with respect to her expertise and skill in litigated matters in order to have Plaintiff retain her and her law firm.

31. Defendant Joshua Levin deceived Plaintiff with respect to Defendant Maria Arena's expertise and skill in litigated matters in order to have Plaintiff retain her and her law firm.

32. Defendant Maria Arena deceived Plaintiff with respect to the costs of litigation in order to have Plaintiff retain her and her law firm, and to continue to retain her and her law firm.

33. Defendants failed to possess and exercise the knowledge, skill, ability, reasonable care, and diligence ordinarily possessed and exercised by members of the legal profession in similar circumstances.

34. The Defendants' conduct as aforesaid, constitute a deliberate, willful, and wanton violation of: (a) their duties and obligations to the Plaintiff; (b) RPC 1.1; (c) RPC 1.4; (d) RPC 1.5; (e) RPC 1.6; (f) RPC 8.4; (g) N.J.S.A 2A:13-4; (h) the American Bar Association Code of Professional Responsibility; (i) and the conduct and responsibilities they were generally obliged to discharge as members of the legal profession.

FOURTH COUNT

35. Plaintiff here repeats and incorporates herein each allegation contained in the First, Second, and Third Counts.

36. In addition to the financial damages caused by Defendant's conduct as aforesaid, such conduct was intended to, and did, cause the Plaintiff emotional and physical distress as Plaintiff came to realize the full nature and extent of the Defendants' unprofessional conduct.

WHEREFORE, the Plaintiff demands Judgment against the Defendants, jointly and severally for:

(a) A refund of all fees and expenses paid to Defendants, plus interest.

(b) Full compensatory damages.

(c) Punitive damages.

(d) Fees and costs.

(e) Such other relief as the Court may deem equitable and just.

Dated: August 23, 1994

/S/ Jonathan A. Chandross

JONATHAN A. CHANDROSS
PRO SE

CERTIFICATION PURSUANT TO RULE 4:5-1

The matter in controversy involved in this action is not the subject matter of any other action pending in any Court, nor of any pending arbitration proceeding and no other action or arbitration proceeding is contemplated. No parties other than those named herein should be joined in this action.

I hereby certify that the foregoing is true to the best of my knowledge, information, and belief.

Dated: August 23, 1994 */S/ Jonathan A. Chandross*

JONATHAN A. CHANDROSS
PRO SE

TO THE DEFENDANTS

Plaintiff demands a trial by jury of all issues involved.

Dated: August 23, 1994 */S/ Jonathan A. Chandross*

JONATHAN A. CHANDROSS
PRO SE

APPENDIX B

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY
UNN-L-5221-94

Civil Action
ORDER

JONATHAN A. CHANDROSS,
Plaintiff-Petitioner,

v.

MARIA ARENA, JOSHUA LEVIN AND
LEVIN, CLANCY, FOSTER & ARENA
Defendants-Respondents.

THIS MATTER having been opened to the Court upon the application of O'Donnell, Kennedy, Vespole,, Piechta & Trifiolis, Attorneys for defendants, MARIA ARENA, JOSHUA LEVIN AND LEVIN, CLANCY, FOSTER & ARENA, and the Court having considered the moving papers, and the Court having hear oral argument and whereas good cause having been shown,

IT IS, on this 29th day of September, 1995;

ORDERED that summary judgment is hereby granted in favor of defendants Maria Arena, Joshua Levin and Levin, Clancy, Foster & Arena and Plaintiff's complaint be and is hereby dismissed with prejudice; and it is

FURTHER ORDERED that a copy of this Order shall be served upon all parties within seven (7) days of the date herein contained.

/S/ Edward J. Toy, J.S.C.

Edward J. Toy, J.S.C.

(X) Opposition Submitted
(_) No Opposition Submitted

APPENDIX C

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION — UNION COUNTY
DOCKET NO. UNN-L-5221-94

Jonathan A. Chandross
Plaintiff (APPELLANT)

vs.

Maria Arena,
Joshua Levin,
Levin, Clancy, Foster & Arena
Defendants (RESPONDENTS)

TRANSCRIPT OF SUMMARY JUDGMENT MOTION

September 29, 1995
Honorable Judge Edward J. Toy, J.S.C.

APPEARANCES:

JONATHAN A. CHANDROSS, Pro Se
Plaintiff

O'DONNELL, KENNEDY, VESPOLE, PIECHTA & TRIFIOLIS,
BY: FRANCES PANZINI-ROMEO, ESQ.,
Attorney for the Defendants

The Court — This is a motion for summary judgement by the defendants, Maria Arena and others. I've read all of the paperwork. And I'll have the appearances, please, first. I know Mr. Chandross is appearing *pro se*.

Ms. Romeo — Frances Panzini-Romeo on behalf of the defendants.

The Court — Can I call you Miss Romeo?

Ms. Romeo — Yes.

The Court — Okay. All right. Okay. I'll hear from you, ma'am.

Ms. Romeo — Judge, this is our application for summary judgment. The action which Mr. Chandross has filed against my client is an action for professional malpractice. That is solely what it is.

The Court — You know, it occurs to me it might be helpful if I heard from Mr. Chandross first.

Ms. Romeo — Fine.

The Court — Mr. Chandross.

Mr. Chandross — Yes, Your Honor.

The Court — Why shouldn't I grant the summary judgment?

Mr. Chandross — Well, as far as the reliance on the *Circle K* case, that case is totally inapplicable and should not be guiding under the present set of circumstances.

In *Circle K*, Circle K filed a lawsuit based on a contract

which contained factual errors. Was an error in rent calculation and some other calculations in terms of the lease. Because of that, there was a reformation action called to fix the contract. Now at that time, Circle K should have brought in its attorney and accountants who are the ones responsible for the error. And, in fact, the Court said in that case the basis issue -- this is citing from Circle K Company --

The Court — Well, why don't you tell me the other issues first. That was just an add-on that Ms. Romeo added. Argue the other issues.

Mr. Chandross — I'm really confused by the filing of the motion for summary judgment. The expert witness report clearly states that the disclosures were unreasonable, that the dual representation was unethical and a violation of court rule.

The Court — What damages did you suffer?

Mr. Chandross — The damages that I suffered was the continuation of the Facstore litigation. he damages I suffered were the use by Facstore of the disclosed material against me.

The Court — What material was disclosed?

Mr. Chandross — The material that was disclosed were the opinions of the defendants that my counterclaim was of no merit and that Facstore's settlement proposal was a good deal and should have been accepted and was rejected by me over their recommendations. Because of that, the plaintiff in that case, Facstore, Inc., was fortified in pursing its litigation against me.

The Court — All right. They were fortified in what way?

Mr. Chandross — They were fortified in that they realized that there was nothing to fear from my counterclaim.

The Court — Did it change the merits of the case, the facts that existed before that time in any way?

Mr. Chandross — Well, there were no facts against me. Facstore admitted in its interrogatory responses, at deposition, and during the trial that it had absolutely no evidence of any wrongdoing by me.

The Court — You were probably right because you won -- you later won the case, didn't you?

Mr. Chandross — I won, but I did not receive my costs under --

The Court — It's a verdict in your favor on the main case, but you got a verdict on your own counterclaim. In fact, you won the main case and got, is it $3500 on the counterclaim. Is that correct?

Mr. Chandross — Thirty-five fifty-one, I believe, Your Honor, yes.

The Court — Thirty-five hundred plus, we'll say, yeah.

Mr. Chandross — Now in addition to --

The Court — If you won --

Mr. Chandross — Well.

The Court — -- how did you lose?

Mr. Chandross — Well, in addition to that issue, Your Honor, there is another issue I wish to address in a moment.

The Court — Go ahead.

Mr. Chandross — But as far as the Facstore issue, I lost because I had to spend close to $20,000 and a vast amount of my time defending myself from a totally meritless action, and it would have been possibility to settle had the plaintiff that case, Facstore, Inc., not been fortified by these disclosures.

Once Facstore realized that there was nothing to fear from pursuing its frivolous litigation, it just continued because it knew there would be no consequences.

And 3551, Your Honor, for a large corporation worth seven million dollars, is nothing. They were intending to harm me with this litigation, and they certainly did. That was their intent.

The Court — When you hired new counsel, you were satisfied with the new counsel, I take it.

Mr. Chandross — Yes, I was, Your Honor.

The Court — And they did a good job?

Mr. Chandross — Given what they had to work with, yes, Your Honor.

The Court — And you tried the case about nine month, as I recall, after the new counsel was hired. Is that correct?

Mr. Chandross — Approximately, Your Honor, yes.

The Court — Were you able to discuss with the new attorney all of the problems that were created by the old attorney? I know for one thing that you learned that there shouldn't have been dual representation by the old attorney. Isn't that correct?

Mr. Chandross — Yes, Your Honor.

The Court — Were you able to discuss any other problems with the new attorney that were created by the old attorney?

Mr. Chandross — Well, there were problems that came to light throughout the case. Obvious mishandling and failures of the attorney to proceed properly.

The Court — And were they corrected by the new group of attorneys?

Mr. Chandross — Many of them could not be corrected, Your Honor.

The Court — For example?

Mr. Chandross — For example, well, I had been linked to the co-defendant, Paul Mahler, who hadn't -- with substantial liability. In fact, the judgment I believe was for approximately $42,000 against --

The Court — Was that for conversion?

Mr. Chandross — Yes, Your Honor.

The Court — Well, didn't he agree when you had the original attorney to accept the conversion and say that you weren't involved with it at all?

Mr. Chandross — Yes, Your Honor. The problem was that I was tainted by the dual representation and it was impossible for me to get out of the case because I had been so linked with Mr. Mahler.

The Court — What proof do you have that you were tainted? I mean, you may have a feeling but how would you prove it.

Mr. Chandross — Well, Facstore made statements in its appeal in the appeal brief, which I can find excerpts if Your Honor wishes, saying that it was clear that either -- and this is an approximation of what was said -- that since either one or both of the defendants had taken the items, Facstore was justified in pursuing its claim against both.

And it should be noted that both of the defendants, Mahler and Chandross, were represented by the same counsel, and so it was clear to Facstore that the conspiracy was continuing. So we were linked not only in the Court's mind by all the papers that had been filed by the same attorney, but also in Facstore's mind that we were still conspiring. And --

The Court — All right. I'll hear whatever else you want to tell me sir.

Mr. Chandross — In addition, even supposing there had been no damage from the pursuit of the Facstore litigation, I would still have a valid cause of action against the defendants because there was a

violation of RPC, a violation of statute, and ample case law.

The Court — RPC, Rules of Professional Conduct?

Mr. Chandross — That's right.

Your Honor, the Rules of Professional Conduct state that when dual representation is to be undertaken, the client has to be notified. No notification occurred.

The Court — It didn't happen, but how were you harmed later on, didn't your attorneys take steps to correct whatever that was?

Mr. Chandross — The problem was there had been such a merging of interest and such a sharing of information that it would not have been possible at that time for me to attack Mr. Mahler saying, in effect, my client Chandross, is innocent, it's the client Mahler that is liable for all of this. That wasn't present in the answer to the complaint. It wasn't present in the motion for summary judgment that was filed on my behalf, and it could not be brought up because at that point we had a RICO case, there were serious

allegations.

And my attorney, as he will testify, felt that it would be very unwise to have a hostile codefendant given the sharing and merging of interests, and so he was just unable to attack Mr. Mahler and Mr. Mahler's credibility and his actions so as to get me out of the case, as I hadn't done anything.

The Court — Your new attorneys didn't share confidences with Mahler or Mahler's attorney, did they?

Mr. Chandross — Not as far as I know. There was certain information that was shared, but I don't know the extent to -- I mean, at that point there really wasn't anything left. Everything had been disclosed. So there really wasn't anything that was not known to Mr. Mahler and his subsequent counsel.

But the issue of the Rules of Professional Conduct, Your Honor, I think is a very serious one. Those rules were created --

The Court — Don't you have a remedy by going to the Bar Association?

Mr. Chandross — Well, Your Honor, the Bar Association certainly isn't going to compensate me for my injuries, and I don't believe that the Bar Association is the proper vehicle --

The Court — Maybe it's like a crime. Maybe you're not meant to be compensated, it's just that they're meant to be disciplined if there were unethical conduct.

Mr. Chandross — Well, Your Honor, as I understand it, the Bar rarely takes action, being run by attorneys.

But excepting that issue, also there's the issue of the misrepresentations made by the defendants. The defendants represented that they were skilled.

The Court — Talk to Mr. Oleske (phonetic) that was just in front of you. He's just been indicted by attorneys. But go ahead. Go ahead.

Mr. Chandross — Well, Your Honor, the defendants were not indicted, much as that would please me.

But in the case before us, they made representations as to their expertise in RICO. Now RICO is a very serious

business. When you get charged with racketeering, that is a very frightening thing, Your Honor. Especially when you haven't done anything. And you see them -- the whole might of the court system being cranked up against you.

They represented that they understood how to handle a RICO case, and, in fact, they did not. And Defendant Arena admitted in her deposition that she had never handled one. Defendant Levin admitted he never handled one. And it was admitted that at the time, the firm had never handled such a case. And subsequent to that, Defendant Arena made representations as to a new partner in her firm who had RICO experience, who admitted that he really had only very limited experience and had never actually tried a RICO case and had never conduced any discovery related to a RICO case.

There were other misrepresentations made as to their skill, experience, and the nature of the litigation that the firm handled.

It turned out that the firm was a real estate firm. I walked into a firm full of real estate lawyers and collection attorneys and they saw me as a naive client, which I was, and they just decided to take advantage of me and charge me a large sum for an attorney with very limited experience, and the case was just mishandled from day one.

Now as I understand it, there's the case of *Nappe v. Anschelewitz*, which states that in a legal malpractice case one must be able to show damages. And in practice, damages only mean that the client received something other than what was bargained for.

Well, I certainly received something other than what was bargained for. I paid and bargained for a highly experienced attorney who understood RICO, who understood conspiracy, who understood conversion cases, and, in fact, I got an attorney who didn't understand any of this and I got a firm that really was not suited for this at all.

And yet, as the issue of the conflict became more and more sever, the attorneys did not say, we're sorry, but we're going to have to withdraw from this case. They wanted to money, they wanted the retainer, and they kept billing and billing and billing.

And, in fact, I was billed for Paul Mahler's legal expenses because there was merged billing. It was impossible for me to determine what legal services were provided to me and those provided to Paul Mahler. And, in fact, Mahler had a more complex case given that he actually had removed items from Facstore's place of business, and there was more billing related to that. But I paid for it, and I was deceived by the defendants.

And I think given this whole parcel of misconduct and this violation of RPC and the violation of statute which prohibits disclosure of information by an attorney, and the case law which says that attorneys must safeguard a client's right

and give the client undivided, undisputed loyalty and advocate that client's interests over all others.

Now they couldn't do that, and they knew they couldn't do that, but they willfully continued because they wanted the money. It was just greed. Nothing more. And because of that greed, I was damaged. But even if I hadn't been damaged, I would still have a cause of action because I received other than what was bargained for.

There a violation of RPC, there was a violation of statute, and the defendants simply can't evade that. And there's a whole pile of case law which says that attorneys must, if even the possibility of a conflict rears its ugly head, disqualify themselves from the case. And if there are any damages, it's the attorney who shall be liable and not the client.

The Court — All right. Thank you, sir. Ms. Romeo -- Romero (sic)

Ms. Romeo — Romeo

The Court — Romeo.

Ms. Romeo — You had it right the first time, Judge.

I'm not going to revisit what I've set forth in my papers.

The Court — I've read it.

Ms. Romeo — Your Honor has read them. I'll just comment basically upon Mr. Chandross's assertions.

Firstly, Mr. Chandross has not been damaged. And that aside, the essential link that's missing is a proximate causation. His expert does not state, for a very good reason, that the alleged negligence of my client proximately caused any damage to Mr. Chandross. He won his case. He was awarded money. The Court found no cause of action in favor of Mr. Chandross.

The allegations that my clients misrepresented the nature of their law firm an their type of practice are unfounded and unsupported by expert testimony. The assertion that my clients' firm is a real estate firm, I have no idea where that came from.

The fact that Ms. Arena may not have tried a RICO case does not mean that she mishandled that portion of this litigation.

In our daily practice, we're called upon to do many things, and every time that you do something, there is a first time for everything, Your Honor, and it doesn't mean that you mishandle a particular task. Their expert does not comment at all upon Ms. Arena mishandling RICO or misrepresenting the quality of her services.

The violation of an RPC is not negligence. It may be evidence of negligence, but in order to establish malpractice you need more than the allegation of negligence. You need proximate causation and the damage, and they're totally missing here.

And in addition to that, I believe under the entire controversy doctrine this action is barred.

The Court You can have the last word, I think you're entitled to it since she should have

gone first.

Go ahead.

Mr. Chandross — Well, Your Honor, this is not a negligence action. It's not that the attorneys failed to do something and because of that some damage accrued. The attorneys acted against my interest. The attorney acquired an interest that was contrary to mine. The attorneys made misrepresentations as to their experience; and Ms. Romeo says, well, you know Ms. Arena could have learned the necessary --

The Court — You know, you keep saying that over again and there's no doubt there was a conflict.

Mr. Chandross — And --

The Court — Do you have an expert that says that there was damages that resulted?

Mr. Chandross — Well, the expert is testifying as to the appropriateness of the defendants' conduct and whether or not there was a conflict of interest and other ethical and fiduciary violations. It seems to me beyond the province of an expert witness to testify as to damages that I suffered.

The Court — That's the whole purpose of an expert witness, is to give an overall opinion.

Mr. Chandross — Well, the --

The Court — As far as I know unless there's something new that just happened.

Mr. Chandross — Well, Your Honor, the expert did say, quoting from the report. "The availability of that crossclaim, its nonassertion on your behalf and your lack of knowledge about its existence placed Ms. Arena and her firm in a clear conflict position with regard to the joint representation by her of you and Mr. Mahler.

"Moreover, the allegations of conspiracy and racketeering under the RICO Act made it inappropriate for joint representation, and Ms. Arena either knew or should have known that she could not fully represent your interest with individual loyalty. Such joint representation in light of the type of allegations brought against you might well connote a continuing conspiracy."

As far as the disclosures, quoting again.

"There was no need for Ms. Arena to advice the Court and, consequently, your adversary that your counter-claim was of limited value and that you refused to accept plaintiff's settlement offer against Ms. Arena's advice. The only purpose served by her making those disclosures was to fortify the plaintiff to avoid a favorable settlement posture on your counterclaim upon which, by the way, I have been advised you prevailed. Having compromised the strength of your position for no necessary reason, Ms. Arena did you and your claim a disservice."

Now it seems to me, Your Honor, that the expert is very clear that this conduct was unacceptable, unethical, and that the defendants had obligations to --

The Court — That's what I just asked you, but then you go on to the next step. He speculates, but he doesn't say that there was damages. He said that you won the case. He points that you, doesn't he?

Why don't you finish up and

tell me what you want to tell me?

Mr. Chandross Now as far as the merged billing from Ms. Arena's deposition -- or, rather from Ms. Arena's deposition transcript, Page 116, Line 7:

"Question: Is it your belief that plaintiff and Paul Mahler did not require separate billing?"

"Answer: I don't know what they required.

"Question: Did you ever ask what sort of billing was required?

"Answer: I don't recall that I did, no."

And later she discusses how she refused to provide separate billing.

Now, Your Honor, this conduct is such that simply going to the Bar is inappropriate. This is a case that warrants punitive damages. This is a case where the factfinder should determine what were their intent, was was their motive in taking on the case and pursing the

case even when the conflict of interest became apparent. What did they intend when they filed their motion to be relieved as counsel containing those disclosures? What was their motivation? What were they trying to do?

And it's clear, as I said in the earlier papers, that they were angry with me for calling up and saying that Ms. Arena was incompetent and for asking another attorney to take over the case. They wanted to harm me.

And, Your Honor, I can dig out the quotations from the transcript where Ms. Arena says that she never contacted me to see if I would object to her being relieved. In fact, I was looking for new counsel and I had furnished discovery materials to the defendants showing that; that I had approached my new attorney at that point and was exploring getting new counsel. They never contacted me. Why? Because they didn't care if I got a new attorney, they were interested in harming me. That

was their intent.

And it seems to me where you have intent and motive and state of mind, that those are jury questions, and the jury has to decide who's credible and the jury has to decide what do the facts really mean. And I don't think that Ms. Romeo has made a convincing case, either based on that strange *Circle K* case with the entire controversy doctrine; which I assume, Your Honor, I need not go into further, and based on the other misconduct, that there is no issue in dispute.

There are all sorts of factual issues in dispute between the parties, and based on that, I think it's a jury question, Your Honor.

The Court All right. I've considered the arguments of counsel and read the briefs.

In this case, the plaintiff Jonathan Chandross is suing his former attorneys alleging that they committed professional negligence by virtue of representing him despite the conflict of interest by the -- also by

revealing secret and confidential information, and also failing to possess and exercise the knowledge and skill, care, and diligence ordinarily possessed and exercised by members of the legal profession.

Plaintiff further claims that he was damaged monetarily, physically, and emotionally. Plaintiff seeks compensatory and punitive damages.

The incident surrounding this cause of action begin in August of 1991 when defendants herein, attorneys, undertook the representation of Mr. Chandross and one Paul Mahler, M-a-h-l-e-r, in connection with litigation filed against them. The suit was entitled *Facstore v. Chandross, et al.*, Docket No. 4526-91.

The Facstore complaint alleged claims of conversion, unjust enrichment, interference with contractual relations, breach of duty and loyalty, breach of employment, unfair competition, and a RICO claim. The defendants represented both

Mr. Chandross and Mr. Mahler.

Mr. Chandross's allegations are as follows:

That Defendant Arena represented to him that she was skilled in litigated matters.

Next, defendant, Joshua Levin -- both Arena and Levin are attorneys and are defendants -- that Leven also represented to him that Defendant Arena was skilled in litigated matters and handled all litigation.

Representation of Mr. Chandross and Mr. Mahler began in August of 1991. Mr. Chandross was not informed of any possible conflict of interest that would arise in the dual representation of both clients until 1992. All defendants had a duty to disclose conflicts and consequences that might result.

Next, Mr. Chandross claims that defendants withdrew as counsel; and Plaintiff Chandross, after receiving new counsel, learned of the conflict of interest arising

from dual representation.

Next, defendants, Mr. Chandross claims, exhibited their dual representation to the benefit of Mr. Mahler, his codefendant.

Next, Mr. Arena (sic) claims that Defendant Arena in a certification to the Court revealed secrets and confidential information. And that is contained in a correspondence, copies of correspondence to and from clients which may prejudice Jonathan A. Chandross and Paul Mahler are not annexed as they contain privilege -- (tape malfunction) -- actual revealed beyond that point.

Mr. Chandross also contends that Defendant Levin in his certification revealed secret and confidential information to the Court. That last reference I read was from the Levin certification.

Also, Mr. Chandross contends that Defendant Arena deceived plaintiff as to her skill, expertise, costs of suit, et cetera; and that the defendants failed to

possess the knowledge, skill, experience, and so on exercised by members of the legal profession.

Also, Mr. Chandross claims that he suffered emotional and physical distress as he came to realize that all nature and extent of plaintiff's [sic] unprofessional conduct.

Now the defendants point out that subsequent to discussing with Chandross on the issue of conflict of interest, Mr. Mahler agreed to take the position that with respect to the claim of conversion, he acted alone, and this agreement was executed on September 9th, 1991.

Also, the defendants points out or contents that on September 30, '91, an answer and counterclaim were filed on behalf of Mr. Chandross

Also, in August of '92, Maria Arena filed notice of motion with the Court to be relieved as counsel. This order was granted on September 25th, 1992.

Also, that the trial of Facstore litigation began on May 10th, 1993, before Judge Sachar, with Chandross represented by new counsel. A verdict was entered in favor of Mr. Chandross on the main case. The Court further awarded Chandross $3,551 on his counterclaim.

Plaintiff filed this suit, the suit that we're dealing with today, on August 23rd, 1994.

On March 17, 1995, an order was entered compelling Plaintiff to produce all expert reports by June 6th, 1995 or be barred from utilizing expert testimony at the time of trial.

On June 16th, plaintiff produced a report. It was beyond the time given by the order and no extensions were consented to by the defendant or granted by any court. Plaintiff has supplied no expert damage reports. The previous report is an on [sic] alleged professional misconduct only and does not go into damages.

Now summary judgment should not be granted unless there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Now that's *Judson v. People's Bank*, 17 N.J. 67. That's a 1954 case.

It is the movant's burden to remove any reasonable doubt as to the existence of any genuine issue of fact. All inferences are to be drawn against the movant in favor of the opponent on the motion. Moreover, where a movant demonstrates a *prima facie* right to summary judgment, the non-movant is required to show by competent evidential material a genuine issue of material fact that existed. This is *Ziemba v. Riverview Medical Center*, 275 Super. 293.

To recover on a theory of malpractice in New Jersey, the plaintiff must establish, one, the existence of an attorney-client relationship placing a duty of care on the attorney; two, the breach of that duty; and, three, proximate causation. And proximate causation is

of particular importance in this matter. This is *Albright v. Burns*, 206 N.J. Super. 625 at 632 (App. Div. 1986).

When a duty is breached, the attorney is liable only for the losses which are caused by his negligence. See *Lieberman v. Employees Insurance of Wausau*, 84 N.J. 325, Page 341, a 1980 case.

Assuming for the sake of argument, there was a breach of duty, the plaintiff has not been injured nor has he suffered any losses. Plaintiff, in fact, won his initial suit and crossclaim and received a judgment of over $3500.

Plaintiff also claims the defendants' conduct caused him emotional and physical distress.

Emotional and physical distress damages should not be awarded in legal malpractice cases in the absence of egregious or extraordinary circumstances. This is 215 N.J. Super 338, *Gautam*, G-a-u-t-a-m. It's at Page 399, a 1987 case.

Damages should generally be limited to recompensing the injured party for his economic loss. In this case, plaintiff makes no allegation of egregious or extraordinary circumstances. Plaintiff sought no psychological, psychiatric, or medical treatment for these alleged injuries and has offered no expert reports on that topic. Plaintiff merely states in his complaint that, quote, "his life has been ruined for the past seven years," as a basis for his claim.

As plaintiff has suffered no losses in any real sense, he has failed on this point to show that a genuine issue as to whether he was injured exists.

The burden is on the plaintiff in a malpractice action to show what injuries were suffered as a proximate consequence of the attorney's breach of duty. That's the *Lieberman* case that I referred to above, at Page 341.

Again, even assuming plaintiff could establish a breach of duty, he has

offered nothing to establish that there were any injuries, let along showing any such injuries were a proximate consequence of attorney's alleged breach of duty.

Mr. Chandross's other allegations against the defendants is that they revealed confidential information to others; thus breaching their fiduciary duty to him. These revelations allegedly occurred in a certificate -- I'm sorry -- certifications of Maria Arena and Joshua Levin to the Court. Both were attached to a notice of motion to be relieved as counsel. The motion was granted. These certifications are attached.

Now I referred to those statements a few moments ago. I note that they were attached to a notice of motion to be relieved as counsel and made at a later time, and in neither of them was there anything of any substance revealed by the attorneys. Mr. Levin said that there are certain documents referred to, but they would be released to the

Court. There's no indication that they ever were released to the Court. If it became necessary; there's no indication it ever became necessary that that information should be released to the Court.

So, basically, we have this situation. We have a matter in which these attorneys, the defendants in this case, undertook to represent Mr. Chandross in another matter and also another person named Mahler. They did so incorrectly in that there was dual representation. Soon after the suit was begun, Mr. Chandross obtained other counsel. the case was not tried for nine months after new counsel was in the case. When the case was tried, Mr. Chandross won the case. Not only did he win the main case; that is as a defendant a verdict was entered in his favor, but he got a verdict on the counterclaim. There's no way that the plaintiff, therefore, could have suffered damages.

If he did suffer damages, there would need to be

expert reports. There are no expert reports. There's an expert report that deals with the conflict of interest and that the attorneys shouldn't have been involved in that conflict in the main case. But the report does not cover the next step; what damages were proximately caused by that dual representation, if any.

There's no expert report that deals with any kind of psychological exam or emotional damage done to Mr. Chandross. Mr. Chandross has a very deep personal conviction that these things happened to him, but it takes more than that to prove that in a court of law. It takes expert testimony. There's been a requirement made by Judge Sachar early on in this case that such reports be provided and they have not been provided.

For all these reasons, the motion for summary judgement will be granted and I'll sign an appropriate judgment.

All right. Thank you.

Ms. Romeo Thank you, Judge.

APPENDIX D

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1453-95T3

JONATHAN A. CHANDROSS,
Plaintiff-Petitioner,

v.

MARIA ARENA, et al.,
Defendants-Respondents.

Argued December 17, 1996 — Decided Jan 16, 1997

Before Judges Michels, Muir, Jr., and Coburn.

On appeal from the Superior Court of New Jersey, Law Division, Union County.

Appellant Jonathan A. Chandross argued the cause pro se.

Frances J. Panzini-Romeo argued the cause for respondent (O'Donnell, Kennedy, Vespole, Piechta & Trifiolis, attorneys; Ms. Panzini-Romeo, of counsel and on the brief).

PER CURIAM

Plaintiff appeals from a summary judgment dismissing his complaint seeking damages for defendants' alleged legal malpractice and violations of the Rules of Professional Conduct by the individual defendants.

We affirm substantially for the reasons expressed by Judge Toy in his oral opinion and because the claim is barred by the Entire

Controversy Doctrine. Although the issue was raised before Judge Toy, he did not address the doctrine issue. We are satisfied the doctrine bars plaintiff's complaint. *See Mystic Isle Dev. Corp. v. Perskie & Mehmad*, 142 *N.J.* 310 (1995); *Circle Chevrolet v. Giordano, Halleran & Ciesla*, 142 *N.J.* 280 (1995), *Cogdell v. Hospital Ctr.*, 116 *N.J.* 7 (1989).

Our affirmance is without prejudice to plaintiff's application for fee arbitration under *R.* 1:20 A. Consonant with the provisions of the rule, plaintiff may submit his dispute to the appropriate District Fee Arbitration Committee.

Affirmed.

APPENDIX E

SUPREME COURT OF NEW JERSEY
C-1208 September Term 1996
43,775

JONATHAN A. CHANDROSS,
Plaintiff-Petitioner,

v.

MARIA ARENA, et al.,
Defendants-Respondents.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-1453-95 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs; and it is is further

ORDERED that the appeal filed in the within matter is dismissed pursuant to *Rule* 212-9.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 17th day of June, 1997.

/S/ Stephen W. Townsend

Stephen W. Townsend
CLERK OF THE SUPREME COURT

FILED June 18, 1997